

MOTION FILED
AUG 16 1996

No. 95-1717

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

UNITED STATES of AMERICA,

Petitioner,

v.

DAVID W. LANIER,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS
CURIAE, AND BRIEF OF VIVIAN FORSYTHE-
ARCHIE AND THE NATIONAL COALITION
AGAINST SEXUAL ASSAULT AS AMICUS
CURIAE IN SUPPORT OF PETITIONER

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BEST AVAILABLE COPY

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1995

United States of America, Petitioner

v.

David W. Lanier, Respondent

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Vivian Forsythe-Archie and The National Coalition Against Sexual Assault hereby ask leave to file the attached *Brief of Vivian Forsythe-Archie and The National Coalition Against Sexual Assault As Amicus Curiae in Support of Petitioner*, pursuant to Supreme Court Rule 37, on the following grounds:

1. Judge David W. Lanier was convicted by the jury in this action of two felony rapes of Vivian Forsythe-Archie. As a victim and survivor of sexual assault by Judge Lanier, and as a woman citizen of the United States, Vivian Forsythe-Archie has a direct interest in protecting her federal rights, and those of other women, including others sexually victimized by Judge Lanier, to be free from sexual assault committed under color of law.

2. The National Coalition Against Sexual Assault (NC-ASA) is a voluntary national organization of over 450 rape crisis centers and individuals, including in the State of Tennessee that, from its founding in 1978, has engaged in organizing, education, research, legislation, litigation, and support of direct service providers who work with survivors of sexual assault. NCASA

exists to end sexual assault. This purpose gives the organization an interest in the proper enforcement and interpretation of laws against sexual assault.

3. The brief of proposed *amici* brings to the attention of the Court relevant matter not already presented by the parties. The decision by the Court of Appeals for the Sixth Circuit (en banc) in this action dismissed the indictment and reversed the convictions of Judge Lanier for lack of a specific and defined basis in federal law as required under 18 U.S.C. §242. *Amici* present a legal argument considered by neither party: that a vast body of federal *sex equality* law specifically defines Judge Lanier's acts of sexual aggression as illegal, making his prosecution under 18 U.S.C. §242 clearly permissible as a matter of law.

4. Based on the foregoing, *amici* have an interest in supporting the position of the petitioner United States reinstating defendant's convictions and in urging reversal of the Sixth Circuit opinion dismissing his indictments.

5. Counsel for *amici* is a Member of the Bar of the Supreme Court of the United States.

6. *Amici* and their counsel offer this Court considerable and distinctive expertise in this important case, based on their extensive experience and knowledge of the legal and social issues raised by sexual assault and victimization.

7. Consent to file this brief has been granted by petitioner and refused by respondent. A copy of the letter of petitioner granting consent is filed with this motion.

8. This brief is filed on August 16, 1996, within the time period required for filing of the brief for petitioner. In addition to the copies filed as required under Supreme Court Rule 26, a copy of the proposed brief was sent to attorney for

the respondent by Federal Express to arrive at his office on August 19, 1996, as specified in the Certificate of Service.

Wherefore, Vivian Forsythe-Archie and NCASA request that this Motion for Leave to File Brief Amicus Curiae be granted and that the attached brief accordingly be filed in this action.

Respectfully submitted,

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August 16, 1996



U. S. Department of Justice
Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

August 14, 1996

Professor Catharine A. MacKinnon
The University of Michigan
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Re: United States v. David W. Lanier
S. Ct. No. 95-1717

Dear Professor MacKinnon:

As requested in your letter of August 14, 1996, I hereby consent to the filing of an amicus curiae brief on behalf of Vivian Forsythe-Archie and The National Coalition Against Sexual Assault.

Sincerely,

Walter Dellinger
Walter Dellinger
Acting Solicitor General

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CONSENT OF THE PARTIES

Letter of Petitioner United States, consenting to the filing of this brief, is filed separately. Respondent declines to consent to the filing of this brief.

STATEMENT OF INTEREST

Vivian Forsythe-Archie was a complaining witness in the federal criminal prosecution under 18 U.S.C. §242 against Judge David W. Lanier, defendant in this action. The jury found him guilty of raping her twice in the mouth and throat in his judicial chambers. Lanier had lured her there by inducements of employment made in connection with his dangled threat to take custody of her child away, securing her silence about the attacks by the same means.

Amicus Archie, as a woman citizen of the United States, has an interest in protecting her federal rights, and those of other women, to be free from sexual assault by state actors.

As a woman U.S. citizen victimized by Judge Lanier, amicus Archie opposes the Sixth Circuit *en banc* majority ruling in this case that there is no clear federal right not to be sexually assaulted by a sitting judge and public employer who was acting in both capacities at the time. At trial, she testified she "was very angry for him invading me and taking away my rights...because he forced me to do things that I didn't want to do. And I have my rights as a human being and as a citizen of these United States that were taken away from me...I am an intelligent woman and I have rights as a United States citizen. There is a Bill of Rights, and I have those (crying)...That is how I felt when I left that room, my rights had been taken away from me." Transcript of Trial Before the Honorable Jerome Turner, Memphis Tennessee, No. CR92-2-0172-TU (W.D. Tenn W.D. 1992) ("Tr.") Vol. III at 457-458. Amicus Archie believes that Judge Lanier, as a judge, well knew that she had the same rights that she knew she had.

In particular, amicus Archie has an interest in and right

to equal treatment by her own government. She is here to protect and defend her federal sex equality rights and those of other women, including others victimized by Judge Lanier, as well as their liberty.

The National Coalition Against Sexual Assault (NCASA) is a voluntary organization with a diverse membership of over 450 rape crisis centers and individuals from all over the United States, including Tennessee. From its inception in 1978, NCASA has been recognized as a major forum and force for eliminating sexual aggression and violence. NCASA exists to end sexual assault through organizing, education, and legislation and to educate and support direct service providers who work with survivors to that end. It pursues its goals through assisting victims, raising public awareness, strengthening laws and law enforcement, and supporting research. Among its other activities, NCASA provides current, accurate, and comprehensive information on sexual assault -- including on the responses of survivors and the community to the sexual assault experience and reports of that experience -- to victim service providers, public policy makers, media, members, and the public. Through its Public Policy Committee, NCASA educates policymakers, networks with other organizations, and issues policy statements. Through NCASA State Contacts and Regional Representatives, NCASA also monitors the enactment and enforcement of national and state laws, including laws against sexual harassment, that have an impact on sexual violence.

Through its members and activities, NCASA has come to understand that sexual assault, the most common victims of which are women and the most common perpetrators of which are men, deprives those violated of their bodily integrity and human dignity, is an act of inequality, flourishes in societies of gender hierarchy, and is appropriately addressed among other means through laws against sex-based discrimination. NCASA has also repeatedly observed that the testimony of survivors of sexual assault, particularly women,

because of invidious attitudes endemic to unequal societies, is often not believed. The interest of NCASA in eliminating sexual assault gives it an interest in promoting laws against it based on this information and these understandings.

BACKGROUND STATEMENT

Eight women charged Judge David W. Lanier, Chancellor of Dyer and Lake Counties in the State of Tennessee, of eleven federal criminal counts of violating their civil rights by sexually assaulting them in his judicial chambers. All eight women worked for or with him at the courthouse or had litigation before him. All had come to see him on business. All testified under subpoena. All eight testified they feared his official power. See, e.g., Tr. Vol. II at 134,141 (Sandy Sanders); Tr. Vol. II at 237 (Sandy Attaway); Tr. Vol. III at 381-384 (Vivian Archie); Tr. Vol. III at 475 (Patty Mahoney); Tr. Vol. IV at 605 (Ruby Sipes); Tr. Vol. IV at 708 (Lisa Couch); Tr. Vol. V at 830-831 (Fonda Bandy); Tr. Vol. V at 902,904 (Patty Wallace). Many still worked under him at the time of trial.

The jury found Lanier guilty of seven counts of sexual assault against five women. He was acquitted on three counts. The district court granted defendant's motion for judgment of acquittal on one count (Count 9) before sending it to the jury.

The jury convicted Judge Lanier of two counts of oral rape of amicus Vivian Archie in his judicial chambers. She testified that Lanier gained access to her and guaranteed her silence by a threat to take legal custody of her daughter away. Tr. Vol. III at 376-380, 388-392, 396.

The jury convicted Judge Lanier of repeatedly groping the breasts and buttocks of his secretary Patty Mahoney. She testified she was forced to quit her job as a consequence. Tr. Vol. III at 479-485.

The jury convicted Judge Lanier of forcibly kissing the

mouth and assaulting the breasts of Sandy Sanders, a juvenile officer hired by Lanier who was required to meet with him weekly. See Tr. Vol. II at 123-125, 126-128. She testified that, after she confronted him about his behavior, he retaliated by criticizing her work and removed her supervisory authority. Tr. Vol. II at 147-148. She remained on the job out of commitment to helping children. (The jury acquitted him of assaulting her buttocks.)

The jury convicted Judge Lanier of grabbing Sandy Attaway, his secretary, of hitting her on the buttocks, and of holding her body to him while he ground his erect penis into her buttocks while gowned in his judicial robes. She testified she told him loudly to stop. Tr. Vol. II at 225-226. She did not quit work because she needed the job. Three months later he fired her, saying things were not working out. He later told her they would have gotten along fine if she had liked oral sex. Tr. Vol. II at 258.

The jury convicted Judge Lanier of forcibly kissing the lips and grabbing the breasts and crotch of Fonda Bandy. She testified that she met with him in chambers in connection with a federal program of parenting classes she had initiated. As she was leaving, he told her if she came back, he would send her all the clients she needed. Tr. Vol. V at 844-845. She never went back and he made no referrals to her program.

The jury acquitted Judge Lanier of forcing sexual intercourse on Lisa Couch, a litigant in a child custody matter in his court. Tr. Vol. IV at 710, 730-731, and of molesting the vaginal area of Patty Wallace, a clerk of court, with his hand behind his judicial bench for one and a half hours while court was in session. See Tr. Vol. V at 887-889. Lisa Couch testified that he was able to assault her because of his power of "being a judge," Tr. Vol. IV at 745, particularly in reference to a pending child custody matter. Tr. Vol. IV at 744-746; 749 ("But I just felt that he had power over me, control over

me."). Patty Wallace testified that she did not think her account would be believed "because he is a judge, and we were in court and there were attorneys there." Tr. Vol. V at 902.

The trial judge dismissed for legal insufficiency the charge based on the testimony of Ruby Sipes that Judge Lanier exposed his erect penis to her and masturbated himself in front of her when she came to his chambers to discuss a case she had pending before him, on which he subsequently ruled against her. Tr. Vol. IV at 601-605, 611.¹

For further statement of the facts of the case, see *United States v. Lanier*, 33 F.3d 639, 646-50 (6th Cir. 1994) (three judge panel affirming convictions).

Lanier appealed his convictions. A three judge panel of the Sixth Circuit affirmed. *United States v. Lanier*, 33 F.3d 646 (6th Cir. 1994). On rehearing *en banc*, the Sixth Circuit, in a divided opinion, reversed, dismissing the indictment for legal insufficiency. *United States v. Lanier*, 73 F.3d 1380 (6th Cir. 1996) (Merritt, J.) The United States petitioned for certiorari. This Court granted the writ.

SUMMARY OF ARGUMENT

The Sixth Circuit *en banc* ruling, *United States v. Lanier*, 73 F.3d 1380 (6th Cir. 1996) (Merritt, J.), erred in reversing the judgment of conviction and dismissing the indictments of

1. The women's trial testimony contained much evidence of unwanted verbal sexual conduct, in the course of, and separate from, the physical attacks. See e.g. Tr. Vol. II at 221-223, 258 (repeated verbal sexual innuendo directed at Sandy Attaway by defendant); Tr. Vol. IV at 712 (Lisa Couch: "He said that this time he wanted me to suck his dick."); Tr. Vol. IV at 603-604 (Ruby Sipes, quoting defendant as he masturbated in front of her: "Come on, go down on me, make me feel good, touch it...put your mouth on it...")

Judge Lanier for lack of a body of federal authority prohibiting his acts. Lanier's victims, in being sexually assaulted by him, were deprived of two federally protected rights: equality as well as the liberty right for which the government argues. On equality grounds, if not on liberty grounds alone, the jury's verdicts of guilt for his crimes against women should be reinstated, vindicating his victims' constitutional and statutory rights to be free of official sex discrimination.

ARGUMENT

I. FEDERAL LAW AGAINST SEX DISCRIMINATION GUARANTEES FREEDOM FROM SEXUAL ASSAULT BY PUBLIC OFFICIALS

A. Federal Law Supports Criminal Prosecution for Sexual Assault By State Actors Under §242 For Deprivation of Equality as well as Liberty

Title 18 U.S.C. Section 242 criminalizes "willful" deprivation of rights "secured or protected by the Constitution or laws of the United States" under color of law. Originally passed by Congress to enforce the Fourteenth Amendment, *Cong. Globe*, 41st Cong., 2d Sess., pp. 3807-3808, 3881, this provision is the criminal equivalent to 42 U.S.C. §1983. "In origin it was an antidiscrimination measure...." *Screws v. United States*, 325 U.S. 91, 98 (1944).

The United States argues in this case that the due process clause of the Fourteenth Amendment contains a recognized liberty right to bodily integrity not to be sexually assaulted by state actors while they are performing official duties. Substantial authority supports this argument. *Stoneking v. Bradford Area School District*, 882 F.2d 720, 727 (1989) (due process right to be free from sexual assault in teacher's sexual molestation of student, citing *Ingraham v. Wright*, 430 U.S. 651

(1977) (unjustified intrusions on personal security violate due process liberty)); *Doe v. Taylor Independent School District*, 15 F.3d 443 (5th Cir.), *cert. denied* 115 S.Ct. 70 (1994) (teacher's sexual abuse of student violates student's due process right to bodily integrity); *U.S. v. Contreras*, 950 F.2d 232, 235-236 (5th Cir. 1991) (§242 conviction of policeman for sexual assault of woman in detention); *U.S. v. Davila*, 704 F.2d 749 (5th Cir. 1983) (§242 conviction of border patrol officers for coercing sex from two women they detained). See also *Dang Vang v. Vang Xiong X. Toyed*, 944 F.2d 476 (9th Cir. 1991) (assuming existence of clearly established fundamental right not to be raped by state employee), *cert. denied*, 504 U.S. 941 (1992). Judge Daughtrey's opinion dissenting from the Sixth Circuit reversal *en banc* powerfully marshals this authority. *United States v. Lanier*, 73 F.3d 1380, 1403-1414 (6th Cir. 1996). Amici agree with the government's argument and with Judge Daughtrey's opinion.

The liberty interest asserted arises under the "substantive due process" component of the due process clause of the Fourteenth Amendment. Its assertion by victims comports with the constitutional due process rights of criminal defendants, avoiding invalidation for vagueness when the violation is "willful," *Screws v. United States*, 325 U.S. at 101, that is, when the accused purposefully violates a right "made specific," 325 U.S. at 104, under federal law. As this Court stated in *Screws*, §242 is saved from vagueness when violations are shown to be intentional. The specific intent required for criminal culpability under §242 is "an intent to deprive a person of a right which has been *made specific* either by the express terms of the Constitution or laws of the United States or by decisions interpreting them." 325 U.S. at 104 (emphasis added).

In addition to providing for the liberty of citizens, federal law incontestably provides for their equality, including through recognizing a right to be free from official sex discrimination

in public employment and in the application of law. See, e.g., *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256 (1979) (intentional sex discrimination in public employment violates Equal Protection); *Reed v. Reed*, 404 U.S. 71 (1971) (use of sex as statutory preference in estate administration violates Equal Protection); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (use of gender to strike jurors violates Equal Protection). Women may not be treated less favorably than men by the state because they are women. "Since *Reed*, the Court has repeatedly recognized that neither federal nor state government acts compatibly with the equal protection principle when a law or official policy denies to women, simply because they are women, full citizenship stature..." *United States v. Virginia*, 116 S.Ct. 2264, 2275 (1996) (Ginsburg, J., for the Court).

Since the mid-1970s, as documented at IB below, sex equality law has squarely recognized that to be sexually assaulted by state actors denies women the stature of full citizenship on the basis of sex. It has done this by recognizing the equality right to be free of sex-based sexual assault wherever the Equal Protection clause of the Fourteenth Amendment and/or Title VII of the Civil Rights Act of 1964 apply. As decision after decision interpreting these provisions makes clear, the sexual assaults for which defendant was prosecuted in this case are clearly encompassed within the terms of the federal prohibition against sex discrimination.

The Equal Protection clause of the Fourteenth Amendment is "the Constitution" and Title VII is one of the "laws of the United States" that the plain language of §242 protects from violation with criminal sanctions.² However, not every

2. The Sixth Circuit (*en banc*) opinion is thus mistaken when it limits §242 as "tied by its language simply to 'constitutional rights.'" 73 F.3d at 1383. None of the rights asserted by victims of Lanier are otherwise protected under Title VII alone, so this case thus does not
(continued...)

violation of the unquestionably established equality right to be free from sexual aggression by government agents supports a criminal prosecution under §242. Not every civil violation of §1983 gives rise to a criminal violation of §242, but it does provide a source for defining those crimes. *United States v. Reese*, 2 F.3d 870, 884 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 928 (1994) ("There is...nothing wrong with looking to a civil case brought under 42 U.S.C. §1983 for guidance as to the nature of the constitutional right whose alleged violation has been made the basis of a section 242 charge."); accord, *United States v. Cobb*, 905 F.2d 784, 788 n. 6 (4th Cir. 1990); *United States v. Bigham*, 812 F.2d 943, 948 (5th Cir. 1987).

Amici submit that where an official defendant acts "willfully," in the *Screws* sense of purposefully violating the right of others to be free from sex-based sexual assault, when that right has been "made specific" in the *Screws* sense of being definitively illegal under federal law at the time the acts were committed, he may be prosecuted under §242 for acts committed under color of his official authority.³ In the case at bar, all these conditions are met, as set forth more fully below. Where, as here, the charged acts are in addition violent, aggressive, and incorrigible, there can be no question that a criminal prosecution is constitutionally proper.

All of the acts for which David Lanier was indicted clearly violated federal sex equality law when he committed them. He therefore acted "willfully" within §242's statutory meaning of the term. There is thus nothing constitutionally vague or uncertain in the application of §242 to sanction his

²(...continued)

pose the question whether a right solely created by federal statute, not also a right directly protected by the Constitution, can give rise to criminal liability under §242.

3. Amici agree with the patently correct argument of the United States that Judge Lanier is a state actor.

behavior. Congress made no exception for the federal law of sex discrimination when it empowered the United States under §242 to prosecute for crimes of inequality. No authority or principle supports the exception to the well-entrenched *Screws* methodology newly crafted by the Sixth Circuit (*en banc*) majority opinion below for women victims of equality violations and for assaults that are sexual.

B. Freedom from Sex-Based Sexual Assault by State Actors Has Been Amply "Made Specific" Under Federal Law.

This Court stated in *Screws*, 325 U.S. at 105:

...[Willful] violators of constitutional requirements, which have been defined, certainly are in no position to say that they had no adequate advance notice that they would be visited with punishment. When they act willfully in the sense in which we use the word, they act in open defiance or in reckless disregard of a constitutional requirement which has been made specific and definite. When they are convicted for so acting, they are not punished for violating an unknowable something.

The terms of this analysis of constitutional requirements apply equally well to "laws of the United States" for purposes of Section 242. Lanier's violations of relevant constitutional and statutory law as interpreted were willful in every respect laid out in this passage. Lanier was not "punished for violating an unknowable something." *Id.*

As an initial matter, Judge Lanier testified at trial that he well knew that the acts with which he was charged were wrong and illegal acts. Tr. Vol. IX at 1572. A fair reading of his testimony supports the inference that he also knew that the assaults with which he was charged were illegal under the

Constitution he was sworn to uphold. Tr. Vol. IX at 1569, 1572.⁴ None of what he was charged with was vague to him. To adapt what Justice Murphy said of murder in *Screws*, amici submit that "There is nothing vague or indefinite in...this most basic of all human rights. Knowledge of a

4. Tr. Vol. IX at 1569:

Q: Well, you understand for example, Judge, that everybody in this country has the right to be free from sexual assault and abuse, you understand that, don't you?

A: Yes, sir, I understand that.

Q: And by everybody, that means women as well as men. You understand that, don't you?

A: Yes, sir.

Q: And you understand that nobody can violate that person's right to freedom of sexual abuse, you understand that, don't you?

A: Yes, sir.

Tr. Vol. IX at 1572:

Q: And you again, in 1990, solemnly swore that you would uphold the laws of the State of the Tennessee and of the Constitution of the United States, isn't that correct?

A: Yes, sir.

Q: And that you wouldn't violate those laws, you would uphold them. You would enforce them fairly. You won't use them for bad purpose, isn't that correct?

A: That's correct.

Q: And I'm sure you would agree, Judge, that it would be a violation of your oath and it would be just plain wrong to take advantage of your power and your position as a judge to assault people who are under your authority and control, wouldn't you agree with that statement?

A: I would agree if I assaulted anybody, it would be a violation of the law.

Q: All right. Well, I know that you deny the assaults, but I think we need to establish that you agree that that would be wrong if it had happened.

A: Yes, sir.

Q: And there is no question about that in your mind, is there?

A: No, sir.

comprehensive law library is unnecessary for officers of the law to know that the right to [sexually assault] individuals in the course of their duties is unrecognized in this nation." 325 U.S. 91, 136-137 (Murphy, J. dissenting).

1. Federal Sex Equality Law Has Increasingly Prohibited Acts of Sexual Aggression Since 1976.

Judge Lanier was clearly on notice, in specific and definite terms, that the acts of sexual aggression with which he was charged violated federal equality law. Each kind of sexual incursion for which Judge Lanier was indicted had been definitively and repeatedly held actionable under a huge body of federal sex discrimination law, as of the date on which he committed the indicted acts. The Sixth Circuit *en banc* majority was simply wrong when it held his violations "previously unknown, undeclared and undefined." *United States v. Lanier*, 73 F.3d 1380, 1394 (1996).

Two years before Lanier's first indicted act was committed, this Court ruled that acts including rape and indecent exposure by a workplace supervisor stated a claim for violation of the federal law against sex discrimination in employment. *Meritor Savings Bank FSB v. Vinson*, 477 U.S. 57, 60 (1986) (sexual harassment as violation of Title VII). In April, 1980, eight years before the first act for which Lanier was indicted, the federal Equal Employment Opportunity Commission's *Guidelines on Discrimination Because of Sex* proscribed "Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature" at work as sexual harassment, hence sex discrimination, under Title VII. 29 C.F.R. §1604.11(a) (Apr. 11, 1980). These sources of federal law are hardly obscure.

Since the mid-1970s, sexual aggression in the workplace has been found to state a claim for sex discrimination under federal statutory law that applies to public employment. *Williams v. Saxbe*, 413 F. Supp. 654 (D.D.C. 1976) (Richey, J.)

(unwanted sexual advances first found actionable as sex discrimination under Title VII; case against public employer); *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977) (Robinson, J.) (same by Court of Appeals). The same kinds of sexual aggression by state actors had been widely recognized to violate the Equal Protection Clause of the Constitution. Rulings so holding prior to Lanier's charged acts included *Bohen v. City of East Chicago*, 799 F.2d 1180, 1185 (7th Cir. 1986), *Gobla v. Crestwood School District*, 609 F. Supp. 972, 978-79 (M.D. Pa. 1985), *Estate of Scott v. deLeon*, 603 F. Supp. 1328, 1332 (E.D. Mich. 1985) ("I have little difficulty concluding...that it was clearly established that sexual harassment could violate the rights protected by the equal protection clause") and *Woerner v. Brzezczek*, 519 F. Supp. 517, 519-20 (N.D. Ill. 1981).

Violations of the Equal Protection Clause have long been held capable of supporting §242 prosecutions. *Lynch v. United States*, 189 F.2d 476 (5th Cir., 1951), cert. denied, 342 U.S. 831 (1951). In *U.S. v. Guest*, construing statutory language identical to §242 under the companion conspiracy statute, 42 U.S.C. §241, this Court held that criminal prosecutions for Equal Protection clause violations were permitted. In holding that §241 was not limited to assertions of conspiracy to violate Fourteenth Amendment due process rights, but encompassed violations of the Equal Protection Clause as well, this Court saw no reason to conclude that §241 "protects rights secured by the one Clause [of the Fourteenth Amendment] but not those secured by the other." *U.S. v. Guest*, 383 U.S. 745, 753 (1965). The same logic applies to the identical language of §242. As this Court said in *Guest*, "We have made clear in *Price* that when §241 speaks of 'any right or privilege secured...by the Constitution or laws of the United States,' it means precisely that." Where the public duty involved is providing process, as in custodial situations, the use of force violates the federal right to due process. *U.S. v. Price*, 383 U.S. 787, 793 (1965). Where the public duty involved is

providing a discrimination-free workplace or equal adjudication of the laws, the use of sexual force instead violates the federal right to equality. If criminal defendants have a right not to be beaten instead of tried, civil litigants surely have a right not to be raped or subjected to indecent exposure in adjudicating their claims.

By 1982, seven years before Judge Lanier molested Sandra Sanders, this federal equality right had become so obvious that a standing trustee in Bankruptcy Court, whose compulsive sexual predations strikingly parallel Judge Lanier's, could be removed on the ground that cases under Title VII "indicate a strong Federal policy against women employees being forced to endure offensive and unwelcome sexual advances by their supervisor or employer." *In the Matter of Chapter 13, Pending and Future Cases*, 19 B.R. 713, 717 33 FEP Cases 1871 (U.S. Bankruptcy Court, W.D. Wash. 1982). This trustee was not even an "employer" within Title VII as Judge Lanier unquestionably was.

By 1988, the year Lanier committed the first assault for which he was indicted, the state of women's federally protected equality rights was so obvious, so taken for granted, that Judge Boggs of the Sixth Circuit could remark in passing that "the mere fact that [a state employee's] Title VII rights to be free from "hostile environment" sexual harassment were clearly established at the time of the challenged conduct" did not defeat a qualified immunity claim. *Poe v. Haydon*, 853 F.2d 418, 429 (6th Cir. 1988). The Sixth Circuit panel handed down this decision only sixteen days after Judge Lanier was said to have sexually molested Patty Wallace on her job by fondling her crotch surreptitiously for an hour and a half in court, creating a sexually hostile working environment if ever there was one. Such allegations were prosecutable beyond cavil under §242 as "willful" violations of a recognized federally protected equality right.

2. Forced Sexual Intercourse and Other Physical Sexual Assault Was Clearly Prohibited By the Federal Law of Sex Discrimination As Of September 1990.

When David Lanier raped amicus Vivian Archie in September 1990, over fifty reported cases of sex discrimination in the federal courts had been brought on facts of forced sexual intercourse or other unwanted physical sexual contact under federal law. At the time of that assault, fifteen cases in U.S. Courts of Appeal had been reported in which alleged sexual *assault* -- forcible sexual intercourse or sexual assault with physical touching or both -- grounded actions under federal sex equality law.⁵ Six were brought against state actors like Lanier under both 42 U.S.C. §1983 and Title VII, thus had constitutional as well as statutory dimension. *Carrero v. New York City Housing Authority*, 890 F.2d 569 (2nd Cir. 1989); *Bohen v. City of East Chicago*, 799 F.2d 1180 (7th Cir. 1986); *Staton v. Maries County*, 868 F.2d 996 (8th Cir. 1989) (previously *Moylan v. Maries County*, 792 F.2d 746 (8th Cir. 1986) (same facts as *Staton* but proceeding only under §1983)); *Starrett v. Wadley*, 876 F.2d 808 (10th Cir. 1989); *Volk v. Coler*, 845 F.2d 1422 (7th Cir. 1988) (also under 1985(3)); *King v. Board of Regents of the University of Wisconsin*, 898 F.2d 533 (7th Cir. 1990). One case, *Poe v. Haydon*, 853 F.2d 418 (6th Cir. 1988), brought under §1983 only, was adjudicated by the Sixth Circuit. One decision stands alone as an exception. *Arnold v. United States*, 816 F.2d 1306, 1310-11 (9th Cir. 1987) (dismissing allegations that appear to include sexual assault for legal insufficiency).

The balance of the sex equality cases grounded on sexual assault reported by Courts of Appeals as of the date of Lanier's first attack on Vivian Archie were brought under

5. Some cases, like *Spencer v. General Electric*, produced more than one decision. Only one is counted and the most on point is cited.

Title VII. *Spencer v. General Electric Co.*, 894 F.2d 651 (4th Cir. 1990) (rape); *Paroline v. Unisys Corp.*, 879 F.2d 100 (4th Cir. 1989); *Guess v. Bethlehem Steel Corp.*, 913 F.2d 463 (7th Cir. 1990) (woman picked up, set down, her face forced against male defendant's crotch); *Perkins v. General Electric*, 911 F.2d 22 (8th Cir. 1990) (rape); *Gilardi v. Schroeder*, 833 F.2d 1226 (7th Cir. 1987) (sex forced by drugging); *Swentek v. USAir, Inc.*, 830 F.2d 552 (4th Cir. 1987); *McKinney v. Dole*, 765 F.2d 1129 (D.C. Cir. 1985) (defendant rubbed up against plaintiff, grabbed her arm and twisted it); *Phillips v. Smalley Maintenance Services, Inc.*, 711 F.2d 1524 (11th Cir. 1983).

As of the first rape of Vivian Archie, thirty seven additional decisions had been reported by the federal district courts adjudicating claims for forced sex acts under federal sex equality provisions. State actors were sued for both constitutional and statutory sex equality violations in two of them, *Russell v. Moore*, 714 F.Supp. 883 (M.D.Tenn. 1989), and *Vermett v. Hough*, 606 F.Supp. 732 (W.D.Mich. 1984), and under §1983 alone in three more, *Wedgeworth v. Harris*, 592 F.Supp. 155 (W.D. Wisconsin 1984), *Skadegaard v. Farrell*, 578 F.Supp. 1209 (D.C.N.J. 1984), and *Murphy v. Chicago Transit Authority*, 638 F.Supp. 464 (N.D. Ill. 1986). In *Wedgeworth*, the district court reflected the well-established and totally uncontroversial nature of the right being asserted in stating that the court "entertains no doubt that an on-duty police officer who uses his position to exert pressure on an unwilling victim so as to force her into sexual intercourse has violated that person's constitutional rights under color of State law." 592 F. Supp. at 159. Surely a judge is not permitted to commit in his chambers a kind of assault on a civil litigant that a police officer is prohibited from committing against a criminal suspect.

The remainder of the federal district court cases are civil suits for sexual assault as sex discrimination, several against

public actors, under Title VII.⁶ The fact that Judge Lanier

6. *Kouri v. Todd*, 743 F.Supp. 448 (E.D. Virginia 1990) (assault and battery); *Boyd v. James S. Hayes Living Health Care Agency, Inc.*, 671 F.Supp. 1155 (W.D. Tenn. 1987) (put hands on woman); *Robson v. Eva's Super Market, Inc.*, 538 F. Supp. 857 (N.D. Ohio 1982); *Rauh v. Coyne*, 744 F.Supp. 1186 (D.D.C. 1990) (man rubbed his 'organ' against woman); *McLaughlin v. State of N.Y., Governor's Office of Employee Relations*, 739 F.Supp. 97 (N.D.N.Y. 1990) (physical and verbal harassment); *Wangler v. Hawaiian Elec. Co., Inc.*, 742 F.Supp. 1458 (D. Hawaii 1990) (assault and battery); *Walker v. Anderson Elec. Connectors*, 736 F.Supp. 253 (N.D. Ala. 1990) (assault and battery); *Caleshu v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 737 F.Supp. 1070 (E.D.Mo. 1990) (kissed plaintiff, touched her thigh); *Hunter v. Countryside Ass'n for the Handicapped, Inc.*, 723 F.Supp. 1277 (N.D. Ill. 1989) (rape); *Beesley v. Hartford Fire Ins. Co.*, 723 F.Supp. 635 (N.D. Ala. 1989) (assault and battery); *Watts v. New York City Police Dept.*, 724 F.Supp. 99 (S.D.N.Y. 1989) (grabbed breast); *Maturo v. National Graphics, Inc.*, 722 F. Supp. 916 (D.Conn. 1989); *Valerio v. Dahlberg*, 716 F.Supp. 1031 (S.D. Ohio 1988) (assault and battery); *Martin v. Merriday*, 706 F.Supp. 42 (N.D.Ga. 1989) (touching); *Stacy v. Hilton Head Seafood Co.*, 688 F.Supp. 599 (S.D.Ga. 1988) (assault and battery); *Valdez v. Church's Fried Chicken, Inc.*, 683 F.Supp. 596 (W.D. Texas 1988); *Llewellyn v. Celanese Corp.*, 693 F.Supp. 369 (W.D.N.C. 1988); *Lapinad v. Pacific Oldsmobile-GMC, Inc.*, 679 F.Supp. 991 (D.Hawaii 1988); *Doe v. Hallock*, 119 F.R.D. 640 (S.D.Miss. 1987) (battery); *Saulsberry v. Atlantic Richfield Co.*, 673 F.Supp. 811 (N.D.Miss. 1987) (assault); *O'Brien v. King World Productions, Inc.*, 669 F.Supp. 639 (S.D.N.Y. 1987); *Holden v. Burlington Northern, Inc.*, 665 F.Supp. 1398 (D.Minn. 1987); *Ross v. Double Diamond, Inc.*, 672 F.Supp. 261 (N.D.Tex 1987); *Lake v. Baker*, 662 F.Supp. 392 (D.D.C. 1987); *Ullmann v. Olwine, Connelly, Chase, O'Donnell & Weyher*, 123 F.R.D. 237 (S.D. Ohio 1987); *Kritil v. Port East Transfer, Inc.*, 661 F.Supp. 66 (D.Md. 1986); *Priest v. Rotary*, 634 F.Supp. 571 (N.D.Cal 1986) (assault); *Scott v. Sears, Roebuck and Co.*, 605 F.Supp. 1047 (N.D.Ill., 1985); *Pryor v. U.S. Gypsum Co.*, 585 F.Supp. 311 (W.D.Mo. 1984); *Curtis v. Continental Illinois Nat. Bank*, 568 F.Supp. 740 (N.D.Ill 1983); *Stewart v. Thomas*, 538 F.Supp. 891 (D.D.C. 1982); *Guyette v. Stauffer Chemical Co.*, 518 F.Supp. 521 (D.C.N.J. 1981). *Perkins v. General Motors, Inc.*, 709 F. Supp. 1487 (W.D. Mo., 1989) (Court of Appeals decision sustaining is listed

(continued...)

can be civilly sued for what he did hardly means that he cannot also be criminally prosecuted. Indeed, while the civil actionability of sex equality violations does not alone ensure their criminality, it supports rather than undermines the case for it, as argued *supra*. And surely Judge Lanier and the Sixth Circuit are not taking the position that public actors should have more latitude in sexually assaulting women in the course of their work than private actors have.

Two of the federal district court cases noted above were reported in Tennessee prior to August 1989, when Judge Lanier molested Sandra Sanders, the first act in time for which he was convicted by the jury. One, *Boyd v. James S. Hayes Living Health Care Agency, Inc.*, 671 F. Supp. 1155 (W.D. Tenn 1987) -- involving a suit for one weekend of sexual harassment of one woman off the job site through acts that fell far short of Lanier's stalking and contact harms -- made indelibly clear that the kind of aggravated behavior he engaged in unquestionably violated federal sex discrimination law. Six of the district court cases reported prior to the commission of any of Lanier's indicted acts were adjudicated in states located within the Sixth Circuit. Judge Lanier was amply on notice that his sexual predations violated the federal law of equality, possessing no arguable "lack of warning or knowledge that the act which he does is a violation of law." *Screws v. United States*, 325 U.S. 91, 102 (1944).

To the present, the direction of federal law is unanimous and unmistakable: sexual assault in settings otherwise reachable under federal law states a claim for sex discrimination. See, e.g., *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992) (compensatory damages available under Title IX for sex discrimination by teacher in sexually harassing student

⁶(...continued)

above) stands out as one of the few in which sex alleged to be forced was found to be consensual.

through sexually-oriented conversations, forcible kissing and "coercive intercourse"). From the date of the first assault on Vivian Archie to the present -- during which time Judge Lanier raped Vivian Archie a second time and sexually attacked Sandy Attaway -- amici find approximately one hundred twenty five more cases of alleged sexual assaults litigated in the federal courts under federal sex equality provisions.⁷

3. Unwanted Sexual Touching Has Been Increasingly Prohibited By Federal Equality Law Since the Mid-1970s.

Federal cases based on unwanted physical sexual contact short of rape or other sexual assault -- like the sexual pawing and groping of Sandra Sanders and Patty Mahoney and the alleged molestation of Patty Wallace -- account for sixteen additional sex discrimination cases prior to September 1990 and over sixty more federal sex discrimination cases between that date and the present, by amici's analysis.

As to these acts, Judge Lanier had "fair warning that his conduct is within" the prohibition of §242. *Screws v. United States*, 325 U.S. at 104. He was "under no necessity of guessing whether the statute applies to him [citation omitted] for he either knows or acts in reckless disregard of its

7. These cases arose only in the employment context, but this recognition of actionability was not, at the time employment, see, e.g., *Greiger v. Sheets*, 689 F.Supp. 835 (N.D. Ill., 1988) (permitting claim for sexual harassment in housing under federal Fair Housing Act sex discrimination prohibition); *Abrams v. Merlino*, 694 F.Supp. 1101 (S.D.N.Y., 1988) (sexual harassment in real estate brokerage and sales services actionable under federal sex equality law), as the Sixth Circuit was well aware. *Shellhammer v. Lewallen*, 770 F.2d 167 (6th Cir., 1985) (sexual harassment in federal housing actionable under Title VIII, hostile environment if sufficiently severe, quid pro quo if sexual favors sought in exchange for benefit). This direction has also continued. See, e.g., *Honce v. Vigil*, 1 F.3d 1085 (10th Cir., 1993).

prohibition of the deprivation of a defined constitutional or other federal right." *Id.* In its *en banc* ruling to the contrary, the Sixth Circuit was clearly mistaken.

4. Indecent Exposure and Public Masturbation Is Increasingly Recognized as a Violation of Federal Sex Equality Law.

Ruby Sipes charged that in February or March of 1991, David Lanier willfully exposed his genitals to her in his chambers when she went to discuss her case. Before sending the case to the jury, the trial judge dismissed this count (Count 9), ruling that there is "no uniformly accepted body of federal law that holds that one has a constitutional right not to be exposed to the sexual genitals of another." Tr. Vol. X at 1737.

On the contrary, drawing on federal statutory law as §242 permits, acts of indecent exposure and public masturbation in employment, in a context of other unwanted sexually aggressive acts, were firmly recognized as acts of sex discrimination as of the date (analyzed as of February 1, 1991) that Lanier offended against Ruby Sipes. *Meritor Savings Bank FSB v. Vinson*, *supra* at 60 ("...exposed himself to her..."); *Hall v. Gus Construction Co., Inc.*, 842 F.2d 1010, 1012 (8th Cir., 1988) ("One crew member exposed himself to Ms. Hall."); *Swentek v. USAIR, Inc.*, 830 F.2d 552, 554 (4th Cir. 1987) ("...exposed himself to her by dropping his trousers."); *McKinney v. Dole*, 765 F. 2d 1129, 1132 (D.C. Cir. 1985) ("exposed himself"); *Sims v. Montgomery County Com'n.*, 766 F. Supp. 1052, 1072 (M.D. Ala 1990) ("...a male officer intentionally left a bathroom door open so as to expose himself to a female officer."); *Caleshu v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 737 F. Supp. 1070, 1077 (E.D. Mo. 1990) ("...exposed his genitals in her presence."); *Bailey v. Unocal Corp.*, 700 F. Supp. 396, 397 (N.D. Ill. 1988) ("supervisor had exposed himself to her"); *Valdez v. Church's Fried Chicken, Inc.*, 683 F. Supp. 596, 605 (W.D. Tex. 1988) ("...pulled her pants down in the restroom

and exposed his genitals to her..."); *Llewellyn v. Celanese Corp.*, 693 F. Supp. 369, 373 (W.D.N.C. 1988) ("She then saw Gene Krampf, standing naked near the doorway, intentionally exposing his genitals to her."); *Priest v. Rotary*, 634 F. Supp. 571, 574 (N.D. Cal. 1986) ("exposed his genitals"); *Zabkowicz v. West Bend Co.*, 589 F. Supp. 780, 782 (E.D. Wis. 1984) ("...exposed his buttocks to Mrs. Zabkowicz between 10 and 20 times"); *Weinsheimer v. Rockwell International Corp.*, 754 F. Supp. 1559, 1566 (M.D. Fla. 1990) ("...the alleged incident involving indecent exposure, whose gravity the Court does not minimize..."). See also *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991) (pattern of pictures at work of naked women with sexual body parts exposed constitutes sexual harassment under Title VII). An equality approach to the injuries at bar suggests that the trial judge erred in law in keeping Count 9 from the jury, supporting remand for a new trial on this count.⁸

Since Lanier's harassment of Ruby Sipes, the federal sex equality prohibition on indecent exposure at work has become stronger still. This development is reflected in Judge Richard Posner's unhesitating placement of indecent exposure in the pantheon of per se sexual harassment at work, along with sexual assaults, other unconsensual physical sexual contact, and pornographic pictures. *Baskerville v. Culligan International Company*, 50 F.3d 428, 430 (7th Cir. 1995) (citing *Meritor Savings Bank FSB v. Vinson*, *supra*, *Harris v. Forklift Systems, Inc.*, 114 S. Ct. 367 (1993), and *Carr v. Allison Gas Turbine Division*, 32 F.3d 1007 (7th Cir. 1994)). See also, *Van Zant v. KLM Royal Dutch Airlines*, 80 F.3d 708 (2d Cir. 1996); *Fleenor v. Hewitt Soap Co.*, 81 F.3d 48 (6th Cir. 1996); *Kotcher v. Rosa and Sullivan Appliance Center, Inc.*, 957 F.2d 59 (2d Cir. 1992) (defendant "often pretended to masturbate and ejaculate at" plaintiff, 957 F.2d at 61, behavior found

8. The government did not appeal the dismissal of Count 9.

"certainly one type of egregious conduct that Title VII was enacted to correct." 957 F.2d at 62-63).

Amici are aware of an additional twenty federal district court cases reported from the date of the harassment of Ruby Sipes to the present in which complaints of sexual harassment as sex discrimination include allegations of indecent exposure or public masturbation, bringing such violations, usually combined with other actionable acts, increasingly firmly within the scope of potential §242 prosecutions. This body of law let David Lanier know, if he did not know already, that just as he was not free to copulate with women by force or grab their breasts at will in the course of his work as Chancellor of Dyer County, he was not free to expose his penis to women who came to his chambers on business.

Screws established that "once a due process right has been defined and made specific by court decisions, the right is encompassed by §242." *United States v. Hayes*, 589 F.2d 811, 820 (5th Cir., 1979), *cert. denied*, 444 U.S. 847 (1979). The same is true for the other clause of the Fourteenth Amendment, the Equal Protection Clause. Civil rights expand as formerly excluded groups articulate their injuries in law. Section 242 was written so as to embody the products of that expansion. Justice Rutledge concurring in *Screws* envisioned this explicitly: "[T]here is a body of well-established, clear-cut fundamental rights, including many secured by the Fourteenth Amendment, to all of which the sections may and do apply, without specific enumeration and without creating hazards of uncertainty for conduct or defense. *Others will enter that category*." 325 U.S. at 131 (Opinion of Rutledge, J.) (emphasis added); *United States v. Lanier*, 73 F.3d 1380, 1413-1414 (Daughtrey, J., dissenting, joined by Nelson, Jones, Keith, and Moore, JJ.) (sources for §242 open-ended by design). Civil rights have expanded as envisioned. If all the sexual offenses for which Lanier was indicted are taken together, several hundred cases in the federal courts have considered acts like

them to be illegal under federal equality law. When he did them, they were clear crimes that can be prosecuted without hazard under §242.

II. EQUALITY LAW PROVIDES A STRONGER PREDICATE THAN DOES SUBSTANTIVE DUE PROCESS FOR §242 PROSECUTIONS FOR SEXUAL ASSAULT.

Substantive due process has a disreputable past, a mixed present, and a cloudy future. The doctrine probably originated in Justice Taney's passing reference in the *Dred Scott* case to slaveholders, deprived of their human property by an act of Congress, as denied due process of law under the Fourteenth Amendment. *Scott v. Sanford*, 60 U.S. (19 How.) 393, 450 (1857). D. Currie, *The Constitution in the Supreme Court*, 271 (1985); J. Ely, *Democracy and Distrust: A Theory of Judicial Review*, 16 (1980); R. Bork, *The Tempting of America*, 31 (1990). Its consequence was to deny Dred Scott his United States citizenship and human status. Not long after, substantive due process invalidated progressive labor legislation on grounds that maximum hours laws violated liberty of contract. *Lochner v. New York*, 198 U.S. 45 (1905). This history of the doctrine as a tool to entrench race and class inequality does not bode well.

In our time, substantive due process has generated important civil liberties, *Griswold v. Connecticut*, 381 U.S. 479 (1965) (the right to privacy), and rights for women, *Roe v. Wade*, 410 U.S. 113 (1973) (decriminalizing abortion). It has also been criticized from a range of perspectives,⁹ the core

9. Currie, Ely, and Bork, *supra*, are examples. See, A. Cicia, "A Wolf in Sheep's Clothing?: A Critical Analysis of Justice Harlan's Substantive Due Process Formulation," 64 *Fordham L. Rev.* 2241 (1996); L. Tribe and M. Dorf, "Levels of Generality in the Definition of Rights," 57 *U. Chi. L. Rev.* 1057 (1990) (a "somewhat tarnished

(continued...)

of which is that it is dangerous and unprincipled because it can mean anything to anyone, taking its contours (such as they are) from emanations of penumbras and its content from the dominant values of the time, assumed to be the values of others. See, e.g., *Michael H. and Gerald D.*, 491 U.S. 110, 121-127 (1989) (Scalia, J., for the plurality) ("a treacherous field"); *Poe v. Ullman*, 367 U.S. 497, 540-555 (1961) (Harlan, J. dissenting). *Roe* has been criticized for its method, recently upheld largely on stare decisis grounds, *Planned Parenthood of S.E. Pennsylvania v. Casey*, 505 U.S. 833 (1992) (plurality) cf. 979-984, 1000-1001 (Scalia, J., dissenting regarding various alleged penumbras), amid growing recognition that the right *Roe* enunciates is properly a sex equality right sounding in equal protection of the laws. See, e.g., C. Sunstein, *The Partial Constitution*, 270-285 (1993); C. MacKinnon, "Reflections on Sex Equality Under Law," 100 *Yale L. J.* 1281 (1991).

Granting that substantive due process embodies a liberty interest for all citizens to be free of all assault, including sexual assault, by state actors, federal criminal protection from specifically sex-based sexual assault by state actors should be — and already is — founded, in addition and alternatively, on the solid ground of equality law. The federally protected right to be free of sexual assault is already an equality right. This is as it should be. It is *sex equality* that women, the most common victims of sexual assault, lose when they are sexually assaulted by state actors, usually men. The full federal citizenship of which Judge Lanier deprived his victims was taken from them as women workers and women litigants. His power to do this derived from his gender and his position of official authority combined. He used his office to get from them as women what he wanted as a man. When he violated them sexually, he violated them as women. He used

⁹(...continued)
 banner"). See also J. Mashaw, *Due Process in the Administrative State* (1985).

the power of the state he wielded as a judge and a public employer to gain access to women so he could sexually use them as a man, and then he used that same state power to silence them so he could escape the consequences such acts have to men who do not have state power. Men citizens did not have to run a gauntlet of groping and penetration to have access to employment and adjudication by Judge Lanier. The crisp comparative standard of equality law recommends itself over the potential bog of value judgments and morality, such as determining what "shocks the conscience"¹⁰ of substantive due process. Criminal law benefits from such clarity.¹¹

The liberty theory of criminality, standing alone, appeared to mislead the Sixth Circuit in the *en banc* oral argument into inapt analogies, such as whether a judge, at the baseball stadium for a Mets game, who angrily beats a ticket scalper, thereby commits a federal crime. Oral Argument (No. 93-5608, June 14, 1995). Suppose instead, in a more appropriate hypothetical suggested by federal equality law, a pro se woman litigant in a case before the Sixth Circuit was summoned to a judge's chambers to discuss the case. The judge rapes her and suggests that her silence will facilitate a legal outcome favorable to her. Many of the complaining witnesses in *Lanier* were presented with that or akin *quid pro quo* situations, such as amicus Archie, who testified Judge Lanier

10. Judge Daughtrey, defending the application of substantive due process in this case, recognizes potential drawbacks in some instances at 73 F.3d at 1413.

11. It is also sex equality law that refutes defendant's argument that his actions were not constitutional violations because they were merely "personal, private actions." *Brief in Opposition*, 3-4. As a matter of law, this argument was rejected in 1976 in sexual harassment cases. *Barnes v. Costle*, 561 F.2d 983, 990 (D.C. Cir. 1977). Whether or not challenged sexual behavior is personal rather than sex-based remains a question of fact.

said, in reference to questions on the custody of her child, "he would help me, for me to help him." Tr. Vol. III at 392. Such a litigant is clearly not treated equally to other litigants. To adapt the language of *Screws*, Vivian Archie had a right for the custody of her child "to be tried by a court rather than by ordeal." 325 U.S. 107. Sexual compliance is no more valid a part of adjudication than beating is a valid part of interrogation. But it is sex equality law -- specifically the definitively established "*quid pro quo*" type of federal sexual harassment law, *Barnes v. Costle*, 561 F.2d 983 (D.C.Cir., 1977); *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 64-65 (1986); *Karibian v. Columbia University*, 14 F.3d 773 (2d Cir. 1994); 29 C.F.R. §1604.11(a)(2) (1980) (*quid pro quo* harassment occurs when "submission to or rejection of [unwelcome sexual] conduct by an individual is used as the basis for employment decisions affecting such individual") -- that specifically defines the deprivation of federal rights suffered by women who are sexually attacked by men in government exercising their power of office.

III. THIS COURT CAN VINDICATE WOMEN'S FEDERAL EQUALITY RIGHTS IN THIS PROCEEDING.

Blame for the failure to recognize women's liberty interests in this case rests squarely with the Sixth Circuit majority, but the United States "neither articulated nor proposed the recognition of a gender-based crime for sexual assault involving discrimination against...women in violation of the Equal Protection Clause." 73 F.3d at 1384.¹² This Court

12. Lanier's defense attorney, Wayne Emmons, at trial repeatedly referred to the case in discrimination terms. Emmons' cross-examination of Sandy Sanders attempted to rebut a charge that Lanier retaliated against Sanders for complaining about sexual harassment. Tr. Vol. II at 147-148. He also refers to the government's claim: "to retaliate against her because she rejected his sexual advances." Tr. Vol. (continued...)

can and should rectify this error in law.

Whether or not specific conduct, if proven, violates a clearly defined federal right is a question of law. The Sixth Circuit, exercising plenary review, dismissed Lanier's convictions on the ground that his conduct, as proven, violated no federal right that had been "made specific" under *Screws*. Amici offer an additional or alternate ground in support of the government's position that the federal right Lanier violated under §242 had been "made specific" under *Screws*. It is entirely appropriate for this Court to consider¹³, and

¹²(...continued)

II at 175. Sexual harassment is an equality claim, not a liberty claim, the "*quid pro quo*" form of which is employment consequences for rejection of sexual advances. "Retaliation" states a separate claim for discrimination. Emmons also observes that sexual harassment is "of a similar nature" to the charges on trial. Tr. Vol. IV at 568. One lawyer for the government as much as admits that this is a sexual harassment case at one point, Tr. Vol. IV at 587 (Moskowitz), although this theory is distinguished by the government at other points, e.g. Tr. Vol. I at 57 (Parker). The government's reference in summation to the "right we all have" not to be violated, Tr. Vol. X at 1771 is not specified as a liberty right to the jury. It could as well be equality. Emmons' defense summation, that Lanier is accused of "violating serious civil rights under our constitution," Tr. Vol. X at 1825, could as well. Indeed, the only mention to the jury of the federally protected right explicitly called "liberty" in the trial located by amici (other than in the judge's jury instructions) occurs in Lanier's counsel's concession that sexual assault, excluding indecent exposure, adequately states a constitutional crime. Tr. Vol. VI at 960-961.

13. Amici raise "not a new claim...but a new argument to support" the government's claim that Lanier was constitutionally found guilty of a federal crime, see *Lebron v. National Railroad Passenger Corporation*, 115 S. Ct. 961, 965 (1995). The argument here is thus "fairly comprised" by the question presented under this Court's Rule 23.1(c). *Procunier v. Navarette*, 434 U.S. 555, 559 n.6 (1977) "In any event, [this Court's] power to decide is not limited by the precise terms (continued...)"

to affirm, Lanier's jury convictions on an additional or alternative legal ground, such as the equal protection ground amici advance. Amici are not asking for Lanier to be tried on a new claim, or objecting to a jury instruction that was accepted by the government, see *City of Springfield, Massachusetts v. Kibbe*, 480 U.S. 257, 258 (1966), but reinstating a jury verdict on an additional or alternate theory, for which the proof accepted on the claim that was tried is legally sufficient.

In convicting Lanier for violation of the civil rights of his victims, the government at trial established all the facts needed for his conviction for a crime of inequality. The case as tried, prosecuted as well as defended, amounted to an inequality case, albeit with none of the benefits to the prosecution that an equality theory would have provided. As a result, what was proven met or exceeded the requirements of an equality approach to the criminality of the same indicted acts.

On the counts of which Lanier was convicted, the jury found that the sexual assaults occurred under color of law and were willful. The factual issues on "color of law" are legally identical in the liberty and equality settings. The proof of willfulness made at trial easily supports the requisite showing of motive or intent by state actors who criminally violate sex equality rights. Intent, in sex discrimination law, goes to

¹³(...continued)

of the question presented." *Procurier at Id.*, citing *Blonder-Tongue Laboratories, Inc. v. University Foundation*, 402 U.S. 313, 320 n. 6 (1971). This Court even has the power, in appropriate circumstances, to consider issues not present in the jurisdictional statement or petition for certiorari and not presented in the Court of Appeals. *Vance v. Terrazas*, 444 U.S. 252, 545 (1980) (collecting cases). See also *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 371 n.4 (1967) (government's "change in theory, in view of the nature and importance of the case," accepted "because the request for the substance of the relief was embraced in the question presented...and because appellees have not been adversely affected.").

whether challenged conduct is sex-based. The evidence at trial of pattern going to "color of law" amply supports a conclusion that Lanier's acts were sex based — as do the acts on their face, the fact of so many victims, and their common gender. See also *Bohen v. City of East Chicago*, 799 F.2d 1180, 1187 (7th Cir. 1986) (in showing intent to discriminate under §1983 in sexual harassment case, "Harassment of the plaintiff alone because of sex is enough.") Each act of which Lanier was convicted was proven unwelcome, as a sex equality theory would require, when the jury found "coercion" on the trial judge's instruction. Tr. Vol. XI at 1901. Because so many of Lanier's indicted actions, proven to be "under color of law," were undertaken in his role as an employer, the case for use of his power over women's jobs to coerce sex "in employment" was also thereby made. For women litigants, the proof that he acted with power over them is no different when he deprives them of their liberty than of their equality. Once the indicted acts are determined criminally actionable as a matter of law, all the anguish over "bodily harm" as an element is eliminated. Excluded pattern and like-kind evidence supporting whether the acts were sex-based would be admitted, supporting the complainants' credibility.¹⁴ Lanier's defense -- "...I have never forced my attention on any of these women

14. Proceeding on the liberty theory, the trial judge ruled that each woman's account had to be taken in isolation, and they could only be taken together to show intent. Tr. Vol. II at 109-110, 263-264; Vol. VI at 1078. Tr. Vol. XI at 1879-1880 (jury instructions). In the experience of amicus NCASA, such a approach devastates the credibility of women who bring sexual assault charges. Each one can be picked off one at a time based on invidious stereotypes: this woman is a whore (Emmons: She got paid for sex. What does that make her? Tr. Vol. X at 1802), this one a flirt (Lanier: She is a real flirtatious sort of woman. She winks at the men, a real slow and deliberate wink. Tr. Vol. IX at 1561), this one a slut, (Emmons:...blow job queen of Dyer County...Tr. Vol. III at 346), and so on. Lanier's acquittal of the rape of Lisa Couch, to which he said she consented, Tr. Vol. VIII at 1529, was a predictable result.

and never touched any of them in any sexual way against their will." Tr. Vol. IX at 1567 -- is unaffected.

CONCLUSION

For the reasons stated, the decision of the Court of Appeals for the Sixth Circuit *en banc* should be reversed, defendant's jury convictions reinstated, and a new trial ordered on Count 9.

Respectfully Submitted,

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August 16, 1996